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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

THE BALTIMORE AND OHIO RAILROAD COMPANY, et al., *Appellants,*

v.

UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION, *Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

MOTION TO AFFIRM

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MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1 (c) of the Rules of this Court, the Erie-Lackawanna Railroad Company, Intervening Defendant, moves that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing an action brought by appellants to set aside an order of the Interstate Commerce Commission.[1] The order in effect permitted a

1. The district court's opinion is reported at 249 F. Supp. 712.

new tariff by Erie-Lackawanna Railroad Company to go into effect April 1, 1965. This new tariff established multiple-car rates on ex-lake iron ore from Cleveland, Ohio, to eight (8) destinations in Ohio and seven (7) destinations in Pennsylvania (J.S. 4, 5). It has been stipulated that these rates are compensatory (J.S. 19a).

Prior to these multiple-car rates, and since 1916, the Erie-Lackawanna Railroad Company had only single-car rates for ex-lake iron ore from Cleveland, which rates were the same as the single-car rates then and now charged by appellants, who are competing iron ore common carriers. The old Erie-Lackawanna single-car rates are still in effect, but Erie-Lackawanna's multiple-car rates are approximately ten per centum (10%) less than the single-car rates (J.S. 3a) and apply if the shipment is at least ten thousand (10,000) tons, if the shipment is tendered at one (1) time from one (1) consignor to one (1) consignee, *and* if the shipment is going to not more than two (2) destinations. The multiple-car rates of Erie-Lackawanna apply now to most of its iron ore business, since most ex-lake iron ore shipments are more than ten thousand (10,000) tons (J.S. 3a).

The appellants attacked Erie-Lackawanna's multiple-car rates before the Interstate Commerce Commission, contending that they would lead to an ex-lake iron ore rate war, were violative of Sections 1(5) and 15(a)(2) of the Interstate Commerce Act, 49 U.S.C. §§1(5) and 15(a)(2), and constituted a destructive competitive practice in violation of the national transportation policy. After a hearing, the Commission found that Erie-Lackawanna was steadily losing its share of the ex-lake iron ore business because its railroad dock was

inaccessible to the larger Lake Erie iron ore vessels (J.S. 20a). The Commission noted a definite trend since 1950 toward the use of these larger vessels in the Great Lakes iron ore trade (J.S. 21a). The Commission adverted to the additional competitive handicap of Erie-Lackawanna in that, even with respect to smaller vessels which could physically reach the dock, extensive and expensive tug assistance is required, which is seldom required by other competing railroad docks (J.S. 22a). The Commission also found that Erie-Lackawanna's multiple-car rates were within the "zone of reasonableness" (J.S. 26a). The Commission, accordingly, ruled that these multiple-car rates were lawful.[2]

A three-judge district court affirmed. It found no merit in appellants' contentions that the Commission failed to follow Sections 1(5) and 15(a)(2) of the Interstate Commerce Act and the national transportation policy; that the Commission applied Section 15(a)(3) of the Act to this case when it should not have; and that the Commission failed to make required findings of fact. The court concluded: "We say to the Commission, as it said to the carriers, we do not sit in judgment on the wisdom of the Commission's results, but only as to whether or not its decision is based on substantial evidence, and whether it is within the terms of the regulatory statutes. We find the Commission's decision in this case to be lawful in all respects" (J.S. 16a).

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2. The Commission did find a technical error in Erie-Lackawanna's filed tariffs which was corrected by Erie-Lackawanna and is not involved in this appeal.

ARGUMENT

The decision below is correct and this appeal presents no question warranting plenary review by this Court.

1. The appellants argued below, and argue here, that Erie-Lackawanna's multiple-car rates are unjust and unreasonable, Section 1(5) of the Interstate Commerce Act (J.S. 34a); result in carrier revenues insufficient to support adequate and efficient railroad transportation service, Section 15a(a)(2) of the Act (J.S. 34a); and constitute a threat to the existing rate structure on ex-lake iron ore and hence a destructive competitive practice.

(a) Section 1 (5) is a broad statutory requirement that rates be just and reasonable. The Commission (J.S. 26a) noted that the parties had stipulated that Erie-Lackawanna's multiple-car rates meet the proper cost standard and stated that "when rates are not above the reasonable maximum, nor below the reasonable minimum, a carrier is at liberty to adjust them within this range. . .", citing *United States v. Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 506 (1935), a case most similar to this case. There is no evidence in the record that these multiple-car rates are not just and reasonable.

(b) Section 15a(2) of the Act directs the Commission, in prescribing rates, to consider the railroad's need for sufficient revenues to provide adequate service. The argument of appellants that the Commission failed to apply Section 15(a)(2) to this proceeding is more or less academic for two reasons: (1) the Com-

mission said that Section 15a)(2) factors "have been considered' (J.S. 27a); (2) the Section 15(a)(2) factors are largely duplicative of those set forth in the national transportation policy which the Commission stated had been considered by it (J.S. 27a).

(c) Appellants argue that Erie-Lackawanna's multiple-car rates constitute a destructive competitive practice in violation of the national transportation policy (J.S. 35a) since they upset a uniform rate schedule on iron ore moving southward from Lake Erie by rail which has been in effect since 1916. The Commission stated that "something more than even hard competition must be shown before a particular rate can be deemed unfair or destructive" (J.S. 27a). The Commission, quoting from *Meats, Fruits, Vegetables—TOFC—Transcontinental,* 316 I.C.C. 585, 592 (1962), summarized its philosophy: "Disapproval of proposed reduced rates could be just as destructive of competition as approval. Obviously, a policy of ratemaking based primarily on maintenance of the status quo would be the antithesis of competition" (J.S. 28a).

This Court, in *United States v. Chicago, Milwaukee St. P. & P. R. Co.,* 294 U.S. 499, 507 (1935), recognized that, "Every change of a rate schedule, either voluntary or involuntary, is a disruption *pro tanto* of the rate structure theretofore prevailing. Plainly such a disruption without more is no sufficient reason for prohibiting a change."

Nothing more has been shown by appellants in this proceeding.

2. The appellants argue that the Commission erroneously applied Section 15(a)(3) of the Act to this proceeding (J.S. 8) and thus has changed the law in rail intramode rate cases. This subsection expressly applies only to "a proceeding involving competition between carriers of different modes of transportation." The Commission did not even refer to Section 15(a)(3) in its opinion in this proceeding. All the Commission said was that the definition of "destructive competitive practice" [which phrase is used in the national transportation policy, and which phrase is *not* used in Section 15(a)(3)] did *not* appear in the national transportation policy nor in the Act; it then stated that "the recent cases dealing with this question have primarily involved intermodal competition, but several criteria have evolved which are relevant to the disposition of this proceeding" (J.S. 27a). This is substantially different from a holding that Section 15(a)(3) is applicable to this case and wholly different from a holding that the Commission treated Section 15(a)(3) as though it changed the law in intramodal rate cases. Certainly, the Commission, in making a determination under the national transportation policy as to whether Erie-Lackawanna's multiple-car rates constituted a "destructive competitive practice", was entitled to look at cases involving this term decided under sections of the Act not applicable to this proceeding.

3. Appellants argue that the Commission failed to make a finding as to the revenue effects of Erie-Lackawanna's multiple-car rates on appellants and on Erie-Lackawanna (J.S. 11). The court below quite properly held that "it is true that the Commission has not made

its findings in seriatim form, but its findings appear in the report, as do its conclusions of law" (J.S. 15a). This Court has heretofore stated that:

> As to the contention of appellants that the Commission's order is not supported by essential findings of fact, §14(1) of the Interstate Commerce Act, 49 U.S.C. §14(1), does not require the Commission to make detailed findings of fact except in a case where damages are awarded. *Manufacturers R. Co. v. United States,* 246 U.S. 457, 487, 489-490. The statute requires the Commission only to file a written report, stating its conclusions, together with its decision and order. This the Commission did, and the essential basis of its judgment is sufficiently disclosed in its report.
>
> *Alabama G. S. R. Co. v. United States,*
> 340 U.S. 216, 227 (1951).

There is a well-defined difference "between what the Commission must *hear and consider* and what it must *specifically find in its report.* . . . In making the ultimate finding . . . the Commission could not have been oblivious to the competitive consequences of its order upon the plaintiffs or upon the public interest". *Southern Kansas Greyhound Lines v. United States,* 134 F. Supp. 502, 506, 509 (W.D. Mo., 1955), *aff'd* 351 U.S. 921 (1956).

4. Erie-Lackawanna's action in initiating multiple-car rates and the Commission's approval thereof is consistent with frequent expressions by the courts that the administrative ratemaker is left with broad discretion as long as no statutory requirement is overlooked, *Ayrshire Corp. v. United States,* 335 U.S. 573 (1949); and that the Act does not deprive a carrier of its initiative to promulgate rates in the first instance. *Luckenbach S. S. Co. v. United States,* 122 F. Supp. 824 (S.D.N.Y. 1954).

The Commission also has recognized the right of a carrier to change rates to remain competitive so long as the new rates are not unreasonable or otherwise in violation of the Act. For example, in *Sand, Gravel, Slag, Stone and Chert,* 165 I.C.C. 731, 761 (1930), the Commission declared:

> It is argued, however, on behalf of the protestants, that because the present adjustment of rates within the Valley has been maintained for a long time, the respondents should not now be permitted to change it. The long continuance of an adjustment is entitled to consideration. But respondents cannot be held to be estopped from changing an existing adjustment if the resulting rates are not unreasonable or otherwise in violation of the act. [citations omitted] Moreover, it is well settled that carriers may, for competitive reasons, establish rates which we could not compel them to initiate.

5. The rail carriers have long decried in the public print their inability to compete effectively in the national transportation market because of governmental restrictions and "red-tape" with respect to rate-making and rate-changing. And yet, when another rail carrier initiates a unilateral rate change and obtains Commission approval therefor, in an attempt to hold its historic share of the ex-lake iron ore traffic, these same rail carriers now raise the cry of "rate war" before this Court and seek the same type of governmental restriction.

CONCLUSION

For the foregoing reasons, we respectfully submit that this appeal presents no substantial question, and that the judgment of the district court should be affirmed.

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